

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF CALIFORNIA
3

4 UNITED STATES OF AMERICA,) Case No. 07CR3342-H
5)
6 Plaintiff,) San Diego, California
7)
8 vs.) Monday,
9) April 14, 2008
10) 9:00 a.m.
11)
12 JOAQUIN BARRAGAN,)
13)
14 Defendant.)
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10 TRANSCRIPT OF ACCEPTANCE OF PLEA WITH P.O. REPORT
11 BEFORE THE HONORABLE MARILYN L. HUFF
12 UNITED STATES DISTRICT JUDGE

12 APPEARANCES:

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1 SAN DIEGO, CALIFORNIA MONDAY, APRIL 14, 2008 9:00 A.M.

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3 (Call to order of the Court.)

4 THE CLERK: Four on calendar, 07CR3342, U.S.A.
5 versus Joaquin Barragan for acceptance of plea, sentencing
6 with presentence report.

7 MR. BLANKENSHIP: Good morning, your Honor, Dale
8 Blankenship on behalf of the United States.

9 THE COURT: Good morning.

10 MS. SHETTY: Good morning, your Honor, Siri Shetty
11 on behalf of Mr. Barragan who is in custody and will shortly
12 be present before the Court.

13 THE COURT: I haven't seen you for awhile.

14 (Pause.)

15 MS. SHETTY: Mr. Barragan is now present before
16 the Court and he will be assisted by a Spanish-language
17 interpreter.

18 THE COURT: Good morning.

19 THE INTERPRETER: Good morning, your Honor,
20 interpreter.

21 THE COURT: Thank you.

22 Is it still your desire to plead guilty?

23 THE DEFENDANT (Through interpreter): I am guilty.

24 THE COURT: Did you plead guilty before the
25 magistrate judge because you are guilty of this crime and

1 for no other reason?

2 THE DEFENDANT: Guilty.

3 THE COURT: Do the parties stipulate that the
4 magistrate judge complied with Rule 11 and that there is a
5 factual basis for his guilty plea?

6 MS. SHETTY: Yes, your Honor.

7 MR. BLANKENSHIP: Yes, your Honor.

8 THE COURT: Based on the findings and
9 recommendations of the magistrate judge upon a plea of
10 guilty, and the defendant's consent filed with the Court on
11 or about January 24, 2008, and the Court's own inquiry and
12 review, the Court will accept the plea of guilty. The Court
13 finds that the plea is freely and voluntarily entered, that
14 the defendant understands his rights and has knowingly and
15 intelligently waived them, that the defendant is competent
16 to enter the plea and that there's a factual basis for his
17 guilty plea.

18 Have you reviewed the presentence report and
19 sentencing information with your client?

20 MS. SHETTY: Yes, your Honor.

21 THE COURT: Is he prepared to be sentenced today?

22 MS. SHETTY: Yes, your Honor.

23 THE COURT: You may proceed.

24 MS. SHETTY: Thank you, your Honor.

25 Based on Mr. Barragan's background, a sentence

1 below the advisory guidelines is sufficient, but not greater
2 than necessary, to fulfill the goals of Section 3553(a).
3 His personal characteristics do distinguish Mr. Barragan
4 from other defendants charged in this district with this
5 crime and does warrant a more lenient sentence.

6 Mr. Barragan's earliest childhood memories are not
7 of going to school or playing with toys or of his friends,
8 playing games with his friends, his memories are of being
9 abused by his stepfather, being constantly hungry, of
10 working at a young age in order to survive. And he did
11 survive, by finding work, by immigrating to the United
12 States, and becoming a legal permanent resident of this
13 country. Until 1998, when he was 40-years-old, he was a
14 successful and productive member of his community. He was
15 raising his family, he was working multiple jobs, he was a
16 good worker and a good father.

17 The 1998 conviction alleged by the Government
18 involved his wife, and Mr. Barragan is mindful that it is --
19 it was a significant offense. As a result of that alleged
20 conviction, he lost his right to being in the United States,
21 and a result of his deportation he now knows -- does not
22 know the whereabouts of his four minor children.

23 To his credit, however, this is the only
24 conviction that the Government alleges is on his record.
25 This makes him quite unlike the majority of 1326 defendants

1 in this district. He has never abused alcohol or drugs, and
2 that alleged conviction appears to be sort of an isolated
3 episode in his life. It wasn't repeated after that and he
4 has no -- he's only in a criminal history category three
5 because he's on parole, and not for any additional criminal
6 conduct in this state.

7 He's not coming back to the United States to
8 commit more crimes, to commit more state crimes. He was
9 simply coming back because his entire family lives here.
10 His parents -- or, his mother, his siblings and his six
11 minor children -- six children, two of which are -- several
12 of which are over the age of 18. Now, Mr. Barragan
13 recognizes that he cannot return here illegally no matter
14 how sympathetic his reason is and no matter how much
15 emotionally he feels connected to -- to the United States.
16 He has learned his lesson and he plans on returning to
17 Mexico and earning a living there. He doesn't have a
18 problem working. He's somebody who, after his last
19 deportation, was working in Mexico, but he was barely
20 squeaking out a living and he -- he dearly missed his
21 family. Again, he understands that's not a reason to return
22 and he, you know, for someone who has not spent that much
23 time in jail in the United States, he doesn't want to return
24 here to spend more time in jail. He can -- he can make it
25 work in Mexico and he's hopeful that he can contact his

1 children by phone in Mexico and that they can come travel to
2 meet him.

3 Because that prior alleged conviction, which
4 results in such a dramatic increase in his sentence, is
5 quite unlike anything, and quite out of character, for Mr.
6 Barragan, we are requesting a sentence below the advisory
7 guideline range.

8 THE COURT: Now he pled nolo. Do you think that
9 that at all reflects the result?

10 MS. SHETTY: Under the law, no. A nolo plea under
11 Ninth Circuit is consider the same. I would note that he
12 received 365 days in county jail. His revocation was simply
13 based on, he was found here illegally after he was deported
14 for that offense.

15 THE COURT: So he got a very -- for the nature of
16 the crime, a very low --

17 MS. SHETTY: That's correct.

18 THE COURT: -- sentence?

19 MS. SHETTY: That's correct.

20 THE COURT: Did he ever reconcile?

21 MS. SHETTY: No, but interestingly, at the time of
22 his sentencing, the prosecutor didn't ask for a stay away
23 order because -- in recognition of the fact they had
24 children together. And I think -- and I'm just inferring
25 this, that this was simply a dispute -- a one-time dispute,

1 and my understanding is it was over alleged infidelity and
2 it -- he deeply regrets it, but it's not something that he
3 has ever repeated or -- it just seems out of character for
4 who he is somebody who doesn't use drugs or alcohol and
5 somebody who has worked his entire life.

6 THE COURT: Do I have the -- now, you've provided
7 me the conviction documents. Were there any other documents
8 that you got, such as a police report or anything?

9 MS. SHETTY: No, I was -- no, I was not able to
10 obtain a police report.

11 THE COURT: What would it be if it was a plus --
12 plus 8?

13 MS. SHETTY: Your Honor, if I could just have a
14 moment to get a sentencing table? At a category three, and
15 a base offense level of 16, reflecting an eight-level
16 increase, it's 27 to 33 months.

17 THE COURT: And you're asking for 30 months?

18 MS. SHETTY: That's correct.

19 THE COURT: So you can analogize that while it's
20 classified as an aggravated felony, it's an aggravated
21 felony with an asterisk?

22 MS. SHETTY: Correct. There's some mitigating
23 circumstances, and I think it's notable that there's just
24 nothing like this on Mr. Barragan's record before or after.

25 THE COURT: The one year with the five years

1 probation and no probation revocations, other than --

2 MS. SHETTY: For returning, that's correct.

3 THE COURT: -- for returning illegally --

4 MS. SHETTY: That's correct.

5 THE COURT: -- is significant to the Court.

6 Thank you. Let me hear from the Government.

7 Maybe there's more to it.

8 MR. BLANKENSHIP: Thank you, your Honor. The
9 Government's recommendation is to join with probation and we
10 recommend a 52-month sentence in this case. That is the
11 middle range of the guideline range -- or the middle of the
12 guideline range. We believe that appropriately reflects the
13 seriousness of the defendant's conduct.

14 In this particular case, we're talking about
15 protection. The need for deterrence, the need for
16 protection of society, and specifically we need to protect
17 the victims of this particular -- of his prior offense.

18 THE COURT: State court judge didn't think so.

19 MR. BLANKENSHIP: They gave him a three --

20 THE COURT: He gave him one year.

21 MR. BLANKENSHIP: They gave him a three-year
22 sentence after that though, your Honor. They gave him a
23 one-year sentence, deported him, and then he came back and
24 he got slapped with three years. That was a pretty
25 significant jump. I think that sends the message that he

1 needs to be -- that they were actually focused on trying to
2 -- if you have -- if you've got to give the guy a break one
3 time, and he comes back and you give him a three-year
4 sentence, based on the revocation of probation, I think it's
5 the opposite conclusion can be drawn from what the defense
6 would have you -- or would argue. In this particular case,
7 it would appear that the judge was more concerned about
8 ensuring that the defendant did not -- protecting the
9 victims of this particular incident. He was picked up on
10 probation revocation and sentenced to a very serious
11 sentence that was a significant increase over the one year
12 initial sentence. And I think that the opposite conclusion
13 can be drawn, that this was --

14 THE COURT: I just can't do the -- 52 months seems
15 way to high, given the Government's plea deals with -- with
16 a number of people who have really really aggravated
17 criminal histories.

18 MR. BLANKENSHIP: Your Honor, this is a forcible
19 sex offense. This is not --

20 THE COURT: A forcible sex offense that sent to
21 the judge, state court judge gave him one year for that.
22 One year.

23 MR. BLANKENSHIP: And then revoked him and gave
24 him an additional three years.

25 THE COURT: But that was for violation -- just

1 for --

2 MS. SHETTY: And that's corroborated in the PSR
3 where it indicates the defendant was found at San Clemente
4 illegally and then revoked. And it's my understand that,
5 according to the PSR, parole is not intending to revoke him
6 again based on the federal sentence. I don't think there's
7 any evidence that Mr. Barragan committed additional criminal
8 conduct of that type.

9 THE COURT: All right, thank you.

10 The Court will hear from Mr. Barragan.

11 THE DEFENDANT: I am sorry for having done what I
12 have done and my coming back in. I am sorry for having done
13 what I have done and of having come back into this country.
14 My intention is to go back to my country to work and live.
15 I mean, after all, that is where I have lived before,
16 although not for a very long time. But I would like
17 somebody to give me some opportunity. I would like the
18 opportunity to know what having a child is, because the ones
19 that I was calling my children, I would call them like that
20 so that they would not feel as badly as I always had felt.
21 I beg God to bless your Honor and all those here present and
22 that is all.

23 THE COURT: Thank you.

24 In this case the Government asked for 52 months,
25 the defense asks for 30 months. The Court first begins with

1 the consideration of the advisory guidelines and then each
2 of the 3553(a) factors. The Court begins with a base
3 offense level of eight, and then plus 16 for the prior
4 aggravated felony. It is a significant felony, there is no
5 getting around that under 2(l)1.2(b)1(a), and so the 16-
6 level increase is warranted. As I said, I was struck by the
7 fact that the state court judge gave only one year
8 initially. So that indicates that the Government's request
9 for mid-range of the guidelines I think is overstated.
10 Then, minus three for acceptance of responsibility makes it
11 an adjusted offense level of 21. The criminal history is
12 Roman Numeral III, and the advisory guideline range is 46 to
13 57 months.

14 Next, the defense asks for consideration of either
15 a departure or a 3553(a) factors. The Government makes a
16 good point that he was revoked and given three years for
17 being here illegally, and I do believe in incremental
18 sentences as well, so the defense's request for a sentence
19 under the three years that the state court judge gave him
20 seems to be not really in keeping with the statutory
21 purposes of sentencing, that I give a sentence that is
22 sufficient, but not greater than necessary to achieve the
23 purposes of sentencing.

24 The Court has considered each of the 3553(a)
25 factors. These are outlined in the presentence report on

1 pages 11 -- primarily on page 11, and the Court concludes,
2 after considering both the advisory guidelines and the
3 3553(a) factors, that a sentence of 46 months, the low-end
4 of the guidelines is warranted.

5 I had considered whether giving 36 months, which
6 would be the three years the state court judge gave, but
7 then that would be the same sentence, and so while of course
8 I've got a lot of discretion to do, what I think is
9 appropriate to achieve a sentence at a sufficient, but not
10 greater than necessary, I think something higher is
11 warranted on the theory that perhaps it provides additional
12 deterrence. So I believe that 46 months is warranted, the
13 low-end of the guidelines.

14 Next the Court imposes the term of supervised
15 release of three years. The Court orders that you abide by
16 the standard conditions of supervised release. This
17 includes the condition that you violate no federal, state or
18 local law. And the special conditions of supervised
19 release, if you are deported, excluded or allowed to
20 voluntarily return to Mexico, you are not to reenter the
21 United States illegally and report to U.S. Probation within
22 24 hours of any reentry to the United States. Supervision
23 will be waived upon deportation, exclusion or voluntary
24 departure. While it's waived, it still exists, so that if
25 you're in violation you could face a violation of supervised

1 release and a new crime if appropriate.

2 The Court has prepared these conditions. One
3 other condition that you're to submit to a search of
4 personal property, residence or boat or vehicle, at a
5 reasonable time and in a reasonable manner by the probation
6 officer. The Court has prepared these conditions in writing
7 in Spanish for you, in your native language. Do you
8 acknowledge receipt of the standard and special conditions
9 of supervised release?

10 THE DEFENDANT: Yes.

11 THE COURT: You have -- the Court will not impose
12 a fine, as the defendant has affirmatively demonstrated an
13 inability to pay a fine, but will impose a penalty
14 assessment of \$100, but remit or waive that due to the
15 difficulties of collection.

16 You have -- excuse me. You have ten days from
17 today's date to file an appeal as to any issue that you've
18 preserved for appellate review. Based on the Court's
19 sentence, has appeal been waived?

20 MS. SHETTY: Yes, your Honor. And your Honor,
21 just for the record, we did file some legal objections based
22 on Amandores-Torres (phonetic) and we understand that --

23 THE COURT: The Court notes that based on present
24 Ninth Circuit law, which the Court is required to follow,
25 that the Court would overrule that objection. And the

1 interesting twist in this matter would be whether or not
2 there's a -- whether nolo contendere would provide any
3 additional justification. However, it is a conviction --
4 under state law, it is a conviction that's a felony and it
5 does not treat it differently and that's how the case law
6 has come out as well. So the Court overrules your
7 objection.

8 MS. SHETTY: Thank you.

9 THE COURT: You have ten days from today's date to
10 file an appeal as to any issue that you preserve for
11 appellate review. Based on the Court's sentence, has appeal
12 been waived?

13 MS. SHETTY: No, your Honor, it's my understanding
14 that Mr. Barragan wishes to preserve his right to appeal.

15 THE COURT: All right. So you will file the
16 notice of appeal within the appropriate time?

17 MS. SHETTY: Yes, your Honor, thank you.

18 THE COURT: Thank you.

19 MR. BLANKENSHIP: Thank you, your Honor.

20 (Proceedings recessed.)
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1 I certify that the foregoing is a correct
2 transcript from the electronic sound recording of the
3 proceedings in the above-entitled matter.

4
5 s/Tara Bauer _____ 6/5/08
6 Transcriber Date

7 FEDERALLY CERTIFIED TRANSCRIPT AUTHENTICATED BY:

8 s/L.L. Francisco _____
9 L.L. Francisco, President
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